Michaelmas Term
[2013] UKSC 71
On appeal from: [2012] EWHC Admin 2771

JUDGMENT

Bucnys (Appellant) *v* Ministry of Justice, Lithuania (Respondent)

Sakalis (Appellant) v Ministry of Justice, Lithuania (Respondent)

Lavrov (Respondent) v Ministry of Justice, Estonia (Appellant)

before

Lord Mance
Lord Kerr
Lord Wilson
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

20 November 2013

Heard on 16 and 17 July 2013

Appellant (Bucnys)

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Respondent (Ministry of Justice, Lithuania)

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LORD MANCE (with whom Lord Kerr, Lord Wilson, Lord Hughes and Lord Toulson agree)

Introduction

1. These appeals concern requests made for the surrender under Part 1 of the Extradition Act 2003 of three persons wanted to serve sentences imposed upon their conviction in other member states of the European Union. The requests relating to the appellants Mindaugas Bucnys ("Bucnys") and Marius Sakalis ("Sakalis") come from the Ministry of Justice of the Republic of Lithuania. The third request, relating to the respondent Dimitri Lavrov ("Lavrov"), comes from the Ministry of Justice of the Republic of Estonia.

2. The Ministries made the requests in the form of "European arrest warrants" intended to meet the requirements of Council Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between member states of the European Union ("the Framework Decision"). Within the United Kingdom, Part 1 of the Extradition Act 2003 was enacted to give effect to the same requirements. Under section 2(7) of the 2003 Act the requests were, after receipt in this country, certified by the Serious Organised Crime Agency ("SOCA"), the designated authority under section 2(9), as Part 1 warrants issued by a judicial authority of a category 1 territory having the function of issuing arrest warrants.

3. The questions of principle raised by the present appeals are whether the requests are open to challenge on the basis that (i) they were not the product of a "judicial decision" by a "judicial authority" within the terms of the Framework Decision and/or of Part 1 of the United Kingdom Extradition Act 2003, and (ii) the Ministries making them did not have the function of issuing domestic arrest warrants and were incorrectly certified by SOCA under section 2(7) of the 2003 Act. If a challenge is open on either or both of these bases, the third question is (iii) whether the challenge is on the evidence well-founded in the case of either or both of the Ministries.

4. The Administrative Court (Aikens LJ and Globe J) on 12 December 2012 answered the first question in the affirmative and the second in the negative: [2013] 1 All ER 1220. As to the third, it concluded that a ministry of justice would under European law be regarded as a "judicial authority" for the purposes of issuing a conviction warrant if it was sufficiently independent of the executive for the purposes of making that "judicial decision" (para 98); it held further that the antecedent process, in the form of a request for the issue of a European arrest

warrant coming from the court responsible for the conviction, was relevant, and that, in the light of these considerations, the requests made by the Ministry of Justice of Lithuania in the cases of Bucnys and Sakalis were valid, while the request made by the Ministry of Justice of Estonia in the case of Lavrov was invalid. Bucnys and Sakalis now appeal, while the Estonian Ministry appeals in the case of Lavrov.

The bases of the requests

5. The request in respect of Bucnys results from his conviction for six housebreaking and one fraud offences, for which a total sentence of 5 years 4 months was passed on 29 February 2007. He was released conditionally by the Alytus Region District Court's order on 12 September 2008, but on 20 February 2010 the Vilnius City 1st District Court quashed his conditional release for failure to abide by the condition, requiring him to serve a further period of 1 year 7 months 28 days. The request for his surrender was expressed to be based on this court order dated 20 February 2010. Since preparing this judgment, the court has been informed by those instructed by Bucnys that he has died, presumably since the hearing. The issue raised remains of general importance, and this judgment records the Court's conclusions on it.

6. Sakalis is wanted as a result of his conviction of a series of serious sexual assaults, including buggery, inflicted on the same victim on 28 October 2006. A sentence of 4 years was imposed by the Vilnius City 1st District Court on 25 January 2008, and his appeal was dismissed in his absence by the Vilnius County Court on 24 December 2008. Sakalis absconded before serving any part of this sentence. The request for his surrender was issued by the Minister of Justice signing as representative of the Ministry of Justice.

7. Lavrov is wanted as a result of murder of an invalid paranoid schizophrenic in the nursing home where Lavrov worked as a medical orderly. He was sentenced to 13 years imprisonment on 23 March 2001, released on parole on 14 July 2008 with an obligation to fulfil supervision requirements. He was recalled to prison by the Viru County Court on 2 December 2009 for failure to fulfil such requirements, meaning that he would have to serve a further 4 years 2 months and 25 days in prison, but he absconded. On 9 February 2010 the Viru County Court issued an arrest warrant. On 10 February 2011, it sent a request to the Ministry of Justice to issue a warrant, leading to the Head of the Ministry's International Cooperation Unit issuing the request in issue dated 31 May 2011, expressed to be on the basis of the warrant dated 9 February 2010.

8. Section 2 of the 2003 Act, as amended by section 42 of, and paragraph 1(1) of Schedule 13 to, the Police and Justice Act 2006, reads:

> "**Part 1 warrant and certificate**
> (1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.
> (2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains —
> (a) …. , or
> (b) the statement referred to in subsection (5) and the information referred to in subsection (6)
> ….
> (5) The statement is one that —
> (a) the person in respect of whom the Part 1 warrant is issued has been convicted of an offence specified in the warrant by a court in the category 1 territory, and
> (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence.
> (6) The information is —
> (a) particulars of the person's identity;
> (b) particulars of the conviction;
> (c) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;
> (d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence, if the person has not been sentenced for the offence;
> (e) particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offence, if the person has been sentenced for the offence.
> (7) The designated authority may issue a certificate under this section if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.
> (8) A certificate under this section must certify that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.
> (9) The designated authority is the authority designated for the purposes of this Part by order made by the Secretary of State...."

9. The Framework Decision was a "third pillar" measure agreed between member states under Title VI of the Treaty on European Union ("TEU") in its pre-Lisbon Treaty form. The heading of Title VI is "Provisions on Police and Judicial Cooperation in Criminal Matters". The Framework Decision was expressed to be made with regard to the TEU "and in particular Article 31(a) and (b) [sic] and Article 34(2)(b) thereof". Article 31(1)(a) and (b) are for present purposes relevant:

> "31(1). Common action on judicial cooperation in criminal matters shall include:
> (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the member states, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;
> (b) facilitating extradition between member states; ….".

10. The Framework Decision starts with recitals, stating inter alia:

> "(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between member states and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between member states should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.
>
> (6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation. ….
>
> (8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the member state where the requested person has been arrested will have to take the decision on his or her surrender.

(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance."

11. The text of the Framework Decision provides:

"GENERAL PRINCIPLES

Article 1

Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member states shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.
…

Article 6

Determination of the competent judicial authorities

1. The issuing judicial authority shall be the judicial authority of the issuing member state which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing member state which is competent to execute the European arrest warrant by virtue of the law of that state.

3. Each member state shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Article 7

Recourse to the central authority

1. Each member state may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A member state may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member state wishing to make use of the possibilities referred to in this article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing member state.

Article 8

Content and form of the European arrest warrant

1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of articles 1 and 2;

(d) the nature and legal classification of the offence, particularly in respect of article 2;

(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing member state;

(g) if possible, other consequences of the offence.

SURRENDER PROCEDURE

Article 9

Transmission of a European arrest warrant

1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.

2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).

3. Such an alert shall be effected in accordance with the provisions of article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in article 8(1).

> For a transitional period, until the SIS is capable of transmitting all the information described in article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority."

Status of designation under article 6 and of SOCA certification under section 2(7)

12. The first two questions identified in paragraph 3 above are inter-related. Part 1 of the 2003 Act was enacted to give effect to the United Kingdom's international obligations contained in the Framework Decision. By its decision in *Assange* [2012] 2 AC 471 this court underlined the strength of the presumption that it did so fully and effectively. The Ministries submit that article 6 of the Framework Decision was intended to leave it to each member state to define its own judicial authority or authorities for the purposes of the Framework Decision, as best suited it; the information given by each state to the General Secretariat of the Council "of the competent judicial authority under its law" should be taken as conclusive, pursuant to the same spirit of mutual trust as underlies the Framework Decision itself; and section 2(7) of the 2003 Act must be taken as having been intended to involve a simple check by SOCA of the information received by the Secretariat, leading to a certificate issued by SOCA which must itself be taken as binding on the question whether the Part 1 warrant was issued by a competent judicial authority for the purposes of the 2003 Act.

13. In a number of domestic authorities, the Ministries' analysis has been accepted: *Enander v Governor of Brixton Prison* [2006] 1 CMLR 999, where Openshaw J thought that any further "inquiry would be attended with considerable practical difficulty, it would be fraught with uncertainty, and would deprive the Act of its efficacy and cannot, in my judgment, have been intended by Parliament" (para 30), *Goatley v HM Advocate* 2008 JC 1 and *Harmatos v Office of the King's Prosecutor in Dendermonde, Belgium* [2011] EWHC 1598 (Admin).

14. In more recent authorities, a different attitude has been taken. At first instance in *Assange* [2011] EWHC 2849 (Admin), para 17, Sir John Thomas P, giving the judgment of the Divisional Court of the Queen's Bench Division thought that:

> "it is clear that in the present state of development of the common area for justice, mutual confidence in the common area for justice and the operation of the EAW will not be advanced unless the courts of the executing state scrutinise requests for surrender under the EAW with the intensity required by the circumstances of each case. …."

Later, he said:

> "46. Although the approach in *Enander* is one that will ordinarily apply, the designation under article 6 does not, in our view, always compel the recognition by another member state as conclusive, if the authority is self evidently not a judicial authority within the meaning of that broad term in the Framework Decision. It is of some interest to note in the light of our observation at para 37 on the status of a Ministry of Justice that in 2007 the Commissioner for Justice and Home Affairs in the Report on the Evaluation of the Transposition of the Framework Decision stated that the designation by some states directly or indirectly of the Ministry of Justice as a judicial authority was contrary to the terms of the Framework Decision. However there appear to have no instances where the Commission has taken action in respect of a body that should not have been designated as a judicial authority.
>
> 47. For example, if a warrant was issued by a Ministry of Justice which the member state had designated as an authority under article 6, it would not, in our view, be a valid EAW under the Framework Decision. The principles of mutual recognition and mutual confidence which underpin the common area for justice would not require the recognition of such a warrant, as it would self evidently not have been issued by a body which, on principles universally accepted in Europe, was judicial. In our view a national judge within the European Union is bound to uphold the principles of mutual recognition and mutual confidence for the reasons we have given at para 17; public confidence in the EAW would only be undermined by the recognition of an EAW issued by a Ministry of Justice in contradistinction to an EAW issued by a judge or prosecutor.
>
> 48. It was accepted by Miss Montgomery QC (who appeared for the prosecutor) that if circumstances arose where it could be said that the person issuing the EAW was not a judicial authority, the designating certificate issued by SOCA would not be conclusive. It would have to be challenged by judicial review. She was right to accept that the certificate was not conclusive, as under section 2(8) of the 2003 Act the function entrusted to SOCA is to certify that the issuing authority has the function of issuing EAWs. It does not certify that it is a judicial authority."

15. In *Dhar v National Office of the Public Prosecution Service, The Netherlands* [2012] EWHC 697 (Admin), King J pursued the same theme, saying:

> "38. True it is that the certificate must be certifying that the issuing authority has been designated by the law of the requesting state as the competent judicial authority for the purpose of issuing such warrants and that the requesting state has given notice to this effect to the General Secretariat of the European council pursuant to article 6(3) of the Framework Decision, but this is not the same in my judgment as certifying that such designated authority is as a matter of fact a judicial authority within the meaning of section 2(2).
>
> 39. Hence in my judgment it must be open, the grant of the certificate under section 2(7) notwithstanding, to this appellant to raise on this appeal (as he could have done before the District Judge) the issue whether the warrant was an invalid Part 1 warrant on the grounds that the purported issuing authority was not a judicial authority within the meaning of section 2(2) of the Act."

16. When *Assange* was before the Supreme Court [2012] 2 AC 471, Miss Montgomery initially maintained the attitude she had taken in the Administrative Court, but in a late change of stance she aligned herself with the Lord Advocate for Scotland's written intervention advancing the same case as the present Ministries. In the event, the majority decision on other points made it unnecessary to decide this point: see per Lord Phillips of Worth Matravers at paras 81-82. However, Lord Kerr of Tonaghmore and I expressed views obiter that article 6 did not mean that any authority about which information was given to the Council Secretariat was ipso facto "judicial" (paras 105 and 238).

17. Mr Knowles QC for the Ministries of Justice on the present appeal submits that, although Lord Phillips said that he was leaving the point open, he had in effect answered it in reasoning with which other members of the majority concurred. Mr Knowles points out that Miss Montgomery's "wider submission" in *Assange* was that, although "judicial authority" had a "broad and autonomous meaning", this meaning describes "any person or body authorised to play a part in the judicial process" (Lord Phillips' judgment, para 5); and that at para 76 Lord Phillips concluded that "the 'issuing judicial authority' bears the wider meaning for which Miss Montgomery contends and embraces the Prosecutor in the present case".

18. Mr Knowles's submission reads more into these passages in *Assange* than can be justified. By "authorised to play a part in the judicial process" must have been meant more than simply "authorised" to issue a European arrest warrant domestically and designated to the Secretariat under article 6(3). Otherwise, there would be no autonomous content at all. Even if one takes the "sens vague" of "autorité judiciare" which Lord Phillips approved in paras 18 and 65, this does not

make an unlimited (only a "wider") range of authorities eligible to be regarded as judicial. Such authorities must be at the least authorities "qui appartient à la justice, par opp[osition] à legislative et administrative". Further, and most importantly, it is clear that the ratio of *Assange* was and is confined to the status of public prosecutor, and that other members of the majority cannot be taken as necessarily having agreed with all that Lord Phillips said on a number of points: see eg Lord Walker of Gestingthorpe at para 91, Lord Brown of Eaton-under-Heywood at para 95, Lord Kerr generally and Lord Dyson at paras 155 to 159 and 171.

19. Finally, in the present case, the Administrative Court also disagreed with *Enander* [2006] 1 CMLR 999 and *Harmatos* [2011] EWHC 1598 (Admin) in so far as they stated that any certificate issued by SOCA under section 2(7) was conclusive or could only be challenged by judicial review, and preferred the views expressed on this aspect by King J in *Dhar* and by Lord Kerr and myself in *Assange*.

Status and interpretation of Framework Decision

20. For reasons explained in this Court in *Assange* [2012] 2 AC 471, paras 208-217, the Framework Decision falls outside the scope of the European Communities Act 1972. It is true, as Aikens LJ observed in para 48 of his judgment in this case, that this makes inapplicable the provision in section 3 of the 1972 Act imposing a duty on domestic courts to treat any question as to the meaning of any European Treaty or any European Union instrument as a question of law to be determined in accordance with the principles laid down by the European Court of Justice. But, viewing the Framework Decision as an international measure having direct effect only at an international level, the United Kingdom must still have contemplated that it would be interpreted uniformly and according to accepted European legal principles. When applying the common law presumption that Part 1 of the 2003 Act gives effect to the United Kingdom's international obligations fully and consistently (*Assange*, paras 201 and 204-206), I would therefore think it appropriate to have regard to European legal principles in interpreting the Framework Decision. Ultimately, however, this is not a point which I see as critical to these appeals.

21. The recitals to the Framework Decision emphasise the importance being attached to the replacement of "traditional cooperation relations" by "a system of surrender between judicial authorities" and of "free movement of judicial decisions". Article 1 emphasises at its outset that a European arrest warrant is a "judicial decision", while article 6 states that the issuing [or the executing] "judicial authority" shall be "the judicial authority of the issuing [or executing] member state which is competent to issue a [or execute the] European arrest

warrant by virtue of the law of that state". Under European law, if a matter is left expressly to national law, then that must be the basic approach. In contrast, if there is no reference to national law at all, then a concept may well fall to be given an autonomous meaning: see eg *Criminal Proceedings against Kozlowski* (Case C-66/08) [2009] QB 307, paras 42-43 and *Criminal Proceedings against Mantello* (Case 261/09) [2010] ECR I-11477, para 38. But even concepts the meaning of which is left to national law may require to be construed as subject to limitations deriving from general European legal principles: see eg *Eman v College van burgemeester en wethouders van Den Haag* (Case C-300/04) [2007] All ER (EC) 486.

22. As a matter of construction, the provision in article 6(3) that each member state shall inform the Secretariat "of the competent judicial authority under its law" cannot in my view be read as making such information unchallengeable and binding all other member states to accept any authority whatever as "judicial" which any member state chooses to designate and nominate as such. In the light of the recitals and articles 1 and 6(1) and (2), the proper view of article 6(3) may well be that it does no more than address the question which judicial authority is competent. But, even if that is wrong, its language is too unspecific to remove from all scrutiny the question whether the authority nominated really does fulfil the express purpose of the Framework Decision to replace the traditional executive liaison with a new system of judicial cooperation between judicial authorities by virtue of judicial decisions.

23. The Framework Decision must be viewed in the light of Title VI under which it was made. The pre-Lisbon Treaty on European Union operated largely on a traditional, inter-governmental basis. But it provided a structure of objectives, principles, powers and procedures within which individual measures such as the Framework Decision fell to be agreed and operated. The Framework Decision is a subsidiary measure, which must be interpreted subject to the general objectives and principles of and powers conferred by that Treaty: see *Edward and Lane, European Union Law*, 3rd ed (2013), paras 6.23-6.24. It is relevant that Title VI not only provides for judicial cooperation, but that the language of article 31(1)(a) - one of the express jurisdictional bases of the Framework Decision (see para 9 above) - expressly distinguishes between competent "ministries" and "judicial or equivalent authorities". It is in my view implausible to suggest that, under the law of the European Union, the concept "judicial" in Title VI has no autonomous content whatever. If that is so, then the concept in the Framework Decision cannot give member states carte blanche to agree that each of them could put whatever meaning they chose upon the concept for the purposes of that measure.

24. Further, even if the boundaries of "judicial" are under Title VI to be regarded as potentially limitless according to the nature and context of the powers being exercised, it by no means follows that the concept has equal width in the

context of a specific measure like the Framework Decision. In this context, it does not to my mind advance the argument far to say that member states must be taken to trust each other, or that the Framework Decision was designed (as it clearly was) to eliminate "delay and complexity" (*Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31, para 53, per Lord Hope of Craighead). The Framework Decision was agreed between member states. But, in a sensitive area which could involve the surrender of a member state's own citizens, it was only agreed on the fundamental premise that the relevant decisions would be taken by and the relevant trust existed between judicial authorities. As Sir John Thomas observed, public confidence would not be advanced if this meant whatever individual member states chose it to mean. In a measure designed to do away with executive involvement, it is also unlikely that European law would leave it to the executive to identify whatever authority it chose as "judicial". Even Lord Phillips' sens vague interpretation of "judicial authority" distinguishes between an authority belonging to the system of justice, as opposed to the legislature or administration; and the distinction cannot be elided by accepting that any authority given the function of issuing a European arrest warrant must ex hypothesi be "judicial".

Section 2(7) of the 2003 Act

25. Section 2(7) of the 2003 Act does not take the Ministries further. First, if the case advanced by Bucnys, Sakalis and Lavrov is right, then section 2(7) does not reflect article 6. Rather, it represents an additional safeguard, of the sort which Lord Hope in *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1, para 24 contemplated that Parliament might have included. The safeguard would require any judicial authority requesting surrender to be an authority with general authority to issue domestic arrest warrants. But, second, if that is wrong, then the certificate contemplated by section 2(7) is not concerned with the question whether an authority is "judicial". The certificate is to state that "the authority which issued the Part 1 warrant" has the function of issuing arrest warrants in the issuing territory. Under section 2(2): "A part 1 warrant is an arrest warrant which is issued by a judicial authority" of the issuing territory. The certificate therefore assumes, but does not certify, that the issuing authority is judicial. If (as I consider) "judicial" is in the context of the Framework Decision a concept with autonomous content, then sections 2(2) and 2(7) must clearly be read (as they can be) as preserving and reflecting its autonomous meaning. How restricted the boundaries are of that autonomous meaning is a different matter. Bearing in mind the diversity within member states of judicial systems and arrangements, they may be quite relaxed. The *Assange* case witnesses to this. I will return to this aspect, after considering the second ground of challenge to the requests for surrender.

Meaning of section 2(7)

26. The second ground of challenge is that the Ministries of Justice of Lithuania and Estonia did not have the function of issuing domestic, as opposed to European, arrest warrants within their respective states and SOCA's certificates under section 2(7) were as a result invalid. The issue of a certificate under section 2(7) is a critical stage in the execution within the United Kingdom of a European arrest warrant. Without it there can be no arrest under section 3 and the person whose surrender is sought cannot be brought before the appropriate judge under section 4. Where a provisional arrest occurs under section 5, the certificate under section 2(7) must be produced to the judge within 48 hours, or such extended period as the judge may grant. Failing this, the person whose surrender is sought will have to be discharged under section 6. In the case law to date, it appears to have been assumed that the certificate contemplated by section 2(7) is a certificate relating to the function of issuing European arrest (or "Part 1") warrants. But Mr James Lewis QC for Bucnys and Sakalis has made a powerful contrary submission, which Mr Alun Jones QC for Lavrov adopts.

27. Mr Lewis points out that the drafters of the Act have been careful to use the concept "Part 1 warrant" when it first appears in any section, referring thereafter where appropriate simply to "the warrant": see eg sections 2(3) and (5), 6(4) and 7(1) and (2). Yet in section 2(7) the drafters used the generic "arrest warrants", when they could have used specific wording like "such warrants" or "such a warrant". Further, as the House of Lords held in *Louca v Public Prosecutor, Bielefeld, Germany* [2009] UKSC 4, [2009] 1 WLR 2550, the words "any other warrant" in section 2(4) do refer to any domestic arrest warrant that may exist. On the other hand, section 2(2) makes clear that a Part 1 warrant is a type of arrest warrant, there were strong contextual reasons for the conclusion in *Louca* and it is possible that the drafters did not use the phrase "such warrants" in section 2(7) because other member states do not have "Part 1" warrants; rather they issue European arrest warrants or some other nationally expressed equivalent, when giving effect to the Framework Decision. Mr Lewis responds to this last point by noting that, if the drafters had had in mind the authority which had the function under domestic law of issuing European arrest warrants and was so designated under article 6(3), they could easily have made this clear by substituting for the last 18 words of section 2(7) words such as "has been designated to the Secretariat of the Council of Ministers under article 6(3) of the Framework Decision as having the function of issuing European arrest warrants in the category 1 territory".

28. If section 2(7) were intended as a safeguard, it would have odd features. First, it would require SOCA to investigate overseas practice, rather than look at the information given to the Secretariat under article 6(3) of the Framework Decision. Second, it would mean that SOCA should refuse a certificate in respect of any request coming from a state which chose to assign competence to issue

European arrest warrants to a specialist or different (perhaps a higher) judicial body than that responsible for domestic arrest warrants. It is true that in the present certificates SOCA certified, inter alia, that the Part 1 warrants issued by the Ministries of Justice were issued by a "judicial" authority, with the function of issuing arrest warrants. But it was no part of their statutory function to purport to certify the "judicial" nature of the issuers, and their doing so can have had no effect in law if the authority certified was not truly judicial within the meaning of the Framework Decision and Act.

29. Mr Lewis submits that a conclusive indication as to the nature of the "function of issuing arrest warrants" to which section 2(7) refers is provided by section 212. Section 212 deals with alerts issued at the request of an authority of a category 1 territory under article 95 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 239, p 19). The history of section 212 is described in para 258 of my judgment in *Assange* [2012] 2 AC 471. Article 95 reads:

> "95.1. Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting contracting party.
>
> 2. Before issuing an alert, the contracting party shall check whether the arrest is authorised under the national law of the requested contracting parties. If the contracting party issuing the alert has any doubts, it must consult the other contracting parties concerned.
>
> The contracting party issuing the alert shall send the requested contracting parties by the quickest means possible both the alert and the following essential information relating to the case:
>
> (a) the authority which issued the request for arrest;
>
> (b) whether there is an arrest warrant or other document having the same legal effect, or an enforceable judgment;
>
> (c) the nature and legal classification of the offence;
>
> (d) a description of the circumstances in which the offence was committed, including the time, place and the degree of participation in the offence by the person for whom the alert has been issued;

(e) in so far as is possible, the consequences of the offence. ….”

The Schengen alert system thus operates through data entered at the request of a domestic judicial authority, but sent by one contracting state to another.

30. To give continuing effect to this system, section 212 of the 2003 Act, as amended by section 68 of the Policing and Crime Act 2009, provided (originally on a temporary, but in the event on a continuing basis) that, where an article 95 alert is issued, then

> “(2) The reference in section 2(2) to an arrest warrant issued by a judicial authority of a category 1 territory is to be read:
>
> (a) as if it were a reference to the alert issued at the request of the authority, and
>
> (b) as if the alert included any information sent with it which relates to the case.
>
> ….
>
> (3) In consequence of subsection (2), this Act has effect with these modifications —
>
> (a) in sections 2(7) and (8) …. for ‘authority which issued the Part 1 warrant’ substitute ‘authority at the request of which the alert was issued’; ….”

The effect of section 212 is thus that sections 2(7) and (8) must, in the context of article 95 Schengen alerts be read:

> “(7) The designated authority may issue a certificate under this section if it believes that the authority at the request of which the alert was issued has the function of issuing arrest warrants in the category 1 territory.

> (8) A certificate under this section must certify that the authority at the request of which the alert was issued has the function of issuing arrest warrants in the category 1 territory."

31. When certifying under section 212, SOCA must be intended to focus on the question whether the domestic judicial authority at the request of which the data were put on the Schengen system in the overseas state had the function of issuing domestic arrest warrants. This shows, Mr Lewis submits, that the very same words used in their original unmodified form in section 2(7) and (8) must also focus on the function of issuing domestic arrest warrants. In my view, that does not follow. When section 212 is in play, there is only one possible judicial authority in play, that is the overseas judicial authority at whose instance the Schengen alert is entered on the system and which is distinct from the contracting state by which the alert is communicated to the United Kingdom. It is natural that any certificate required should look at the status and functions of that overseas domestic judicial authority. When section 212 is not in play, the directly relevant judicial authority is the authority which issues the European arrest warrant. The status and functions of the authority issuing any domestic warrant (if any) are of subsidiary interest, even though the existence of any such domestic warrant will need to be noted in the European arrest warrant under article 8(1)(c) of the Framework Decision and section 2(4)(b) of the 2003 Act, as decided in *Louca* [2009] 1 WLR 2550. It is therefore possible for the same phrase to point in different directions in these two different contexts. To treat section 212 as altering what would otherwise be the appropriate meaning to put on section 2(7) and (8) would, in my view, be to treat the tail as wagging the dog.

32. Mr Lewis seeks to rely on Parliamentary material under the principle in *Pepper v Hart* [1993] AC 593. That involves showing that the provision is ambiguous or obscure and that there are ministerial statements which, viewed in the context of the Parliamentary material as a whole, provide a clear answer as to its meaning. I do not consider that these conditions are met. I doubt whether section 2(7) is even sufficiently ambiguous or obscure to justify looking at Parliamentary material on this point. Assuming that it is, it is true that one finds ministerial statements that European arrest warrants would be issued by precisely the same authorities as currently issued the (necessarily domestic) warrants on the basis of which executive requests were previously made between states for surrender: see eg Mr Ainsworth's statements in Standing Committee on 9 January 2003 (Hansard (HC Debates), col. 48), which I quoted in *Assange* [2012] 2 AC 471, para 253. But immediately afterwards Mr Ainsworth went on to say that "By the time that countries start to operate the European arrest warrant, we will know which authorities will be competent to issue them. It will be reasonably straightforward for the issuing authority to be identified and it will be possible to cross-check them with the central record kept by the general secretariat" and a little later (at col 51) that "If the issuing authority were not a judicial authority as

designated in the framework document", the body charged with certifying would not accept the warrant.

33. These statements made clear that in the minister's mind certification was linked with the information provided under article 6 of the Framework Decision, which goes to the function of issuing European arrest warrants, not domestic warrants. The upshot is that neither in these nor in any other passages is there the clarity of statement that could assist to put a different meaning on section 2(7) to that which I consider otherwise follows on ordinary principles of construction. In my view, section 2(7) must (other than in the context of Schengen alerts under section 212) be taken as referring, however awkwardly, to the function of issuing European arrest warrants, not domestic.

"Judicial authority"

34. The second ground of challenge to the requests therefore fails, and I turn to consider whether the Ministries can be regarded as judicial authorities for the purposes of issuing the requests in issue on these appeals. The question is whether the concept of "judicial authority" embraces any category of persons beyond courts, judges, magistrates and (in the light of *Assange*) public prosecutors, and if so in what circumstances. Mr Knowles argued for a positive answer, relying on all five reasons on which Lord Phillips based his judgment in *Assange*. But only one of these reasons received any real endorsement even in the other majority judgments in that case: see Lord Walker at para 92. Lord Brown at para 95, Lord Kerr generally and Lord Dyson at paras 155 to 159 and 171.

35. I add only, with regard to the third reason, that I agree with Lord Dyson (para 158) that the removal from the December 2001 Council redraft of the Commission's September 2001 proposal of definitions of "judicial authority" in terms of a judge or public prosecutor provides no basis for concluding that it was intended to broaden the scope of the concept beyond judge or public prosecutor. It is at least as likely that there were considerable reservations in some member states about appearing to accept a judge or public prosecutor as an appropriate judicial authority for the purposes of both issuing and executing European arrest warrants, as would have been the effect of the definitions included in the September 2001 proposal. Any further conclusion would be speculation. As regards the fourth reason, I also agree with Lord Dyson (para 159) that the assumption in article 6 that there may be a range of judicial authorities from which to chose that which is to be competent to issue European arrest warrants says nothing significant about the scope of the concept of judicial authority. This is all the more so, now that it is decided by *Assange* that the range can include both courts and public prosecutors.

36. The one ground which did influence most members of the court in *Assange* was Lord Phillips' fifth and final ground, based on applying the principles of the Vienna Convention on the Law of Treaties 1969 to the international agreement reached under Title VI and embodied in the Framework Decision. As appears by the five paragraph coda which appears at the end of the Court's judgment in *Assange* as published in [2012] 2 AC 471, 569-570, the relevance of the principles in the Vienna Convention was assumed, not argued, in *Assange*. When, after the draft judgment on the substance was handed down, Miss Rose QC applied to re-open the appeal to take issue with the relevance of the Vienna Convention, her application was rejected as being without merit, not because the point she wished now to raise would itself have been meritless, but because it was too late to do so on that appeal. She had had her chance to raise it during the course of oral argument before the hand down, but had accepted that the Vienna Convention applied and that state practice was a potentially relevant aid to construction.

37. On the present appeals, there has been no such acceptance. The applicability of the Vienna Convention and the relevance of state practice have been put squarely in issue. The issue is of potential relevance (though each country's law and practice may raise different considerations) because, in addition to Lithuania and Estonia, it appears that Finland and Sweden have under article 6 designated bodies operating as part of or under their Ministries of Justice as their issuing judicial authority in the case of conviction warrants - in the case of Finland the Criminal Sanctions Agency, in the case of Sweden the National Police Board; and Germany has designated its Ministry of Justice, although stating that its powers have been transferred to the public prosecutor at the relevant regional court. Further, two countries have designated their Ministries of Justice as their issuing authority in the case of accusation warrants – Denmark outright, and Germany subject to the same transfer of powers to the regional public prosecutor.

38. The evidence of state practice is thus, on any view, much more limited than that which existed in relation to the use of public prosecutors as recounted in *Assange*, where it appeared that some 11 states had nominated public prosecutors in the case of accusation warrants and some ten in relation to post-conviction warrants. (The information now before the court indicates that these figures were slightly inaccurate, and should have been ten, or pre-trial 12, in the case of accusation warrants and eight in the case of conviction warrants.) Nonetheless, Mr Knowles submits that the designation of Ministries of Justice should, even if limited, be regarded as significant, because of the absence of evidence that other states have challenged the designation or refused to execute warrants. Bearing in mind that it is unclear how far any challenge would fall to be raised by executing states, rather than by the persons whose surrender was sought, and that there has been no detailed study of state legislation or practice in cases where it is by implication suggested that a challenge might have been raised, I am unimpressed by the strength of the alleged practice as an indicator of any agreement of the state

parties regarding interpretation, within the meaning of article 31(3)(c) of the Vienna Convention. As I noted in *Assange*, at para 242, the fact that three states (Denmark, Germany and Romania) have also designated their Ministries of Justice as executing judicial authorities is also capable of raising questions about the reliability of state practice as a guide, even if otherwise admissible.

39. As to the question of principle, whether the Vienna Convention is applicable to the Framework Decision, in my view it is unlikely as a matter of European law that it is or would be so regarded. For reasons already indicated in paragraph 23 above, the Framework Decision must be understood in the context of Title VI of the pre-Lisbon Treaty on European Union, and the structure of objectives, principles, powers and procedures contained in that Treaty, including, where individual States agreed, provisions relating to the Court of Justice's jurisdiction: see eg articles 2 to 6, 29, 31, 35 and 39. So viewed, I do not consider it correct to describe the Framework Decision as a treaty at all. It is a subsidiary measure, which fell to be agreed by unanimity within the scope of the powers conferred by, as well as in accordance with the procedures defined by, the pre-Lisbon Treaty on European Union. It must be interpreted as such: see the passages from *Edward and Lane* cited in paragraph 23 above. Under the pre-Lisbon Treaty on European Union, among the important pre-conditions to the agreement of the Framework Decision was the express requirement under article 39(1) for the Council to consult the European Parliament upon it as a measure agreed for facilitating extradition within article 34(2)(b). The European Parliament had three months to deliver an opinion upon the measure. Its opinion, delivered on 9 January 2002, approved the measure, but with the request that the Council notify the Parliament should it intend to depart from the approved text. The argument that subsequent state practice by members of the Council could change or affect the meaning of a Framework Decision potentially sidelines the European Parliament's role. For that reason alone, it is not one that I believe that the Court of Justice would be likely to endorse even under the pre-Lisbon Treaty on European Union.

40. There is a striking absence in the textbooks and case law of any reference to, or any instance of the application of, subsequent member state practice as establishing the agreement of member states to a particular interpretation, or as having any real relevance to interpretation, of a measure introduced under any of the European Treaties. The court was referred to *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, an article by P J Kuijper (a legal adviser to the Commission), published in Legal Issues of European Integration, (1998) vol 25, issue No 1. The article focuses on references to the Vienna Convention in relation to treaties and secondary legal acts entered into by the Community with third parties. The European Treaties themselves are of a special and different nature, as the article points out with reference to the Court of Justice's *Opinion 1/91* [1991] ECR I-6079. In that Opinion the court said:

> "21 In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only member states but also their nationals (see, in particular, the judgment in *Van Gend en Loos* (Case 26/62) [1963] ECR 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the member states and the direct effect of a whole series of provisions which are applicable to their nationals and to the member states themselves."

41. With regard to the possibility that subsequent practice might influence the interpretation of Community law, the article at pp 9-10 states bluntly that:

> "It may be interesting to recall here that, as far as Community law is concerned, and certainly where the provisions of the Community Treaty are concerned, the Court of Justice does not accept arguments of subsequent practice at all. The Court in such cases has recourse to the standard phrase that 'mere practice' cannot change the treaty".

Cited in support are *French Republic v Commission of the European Communities* (Case C-327/91) [1994] ECR I-3641 and the Court of Justice's *Opinion 1/94* [1994] ECR I-5267. In the former, the issue was the extent of the Commission's powers to conclude agreements with third countries, under article 228 EEC which provided for such agreements to be negotiated by the Commission and concluded by the Council after consulting the Parliament "subject to the powers vested in the Commission ("reconnues à la Commission") in this field". The Commission argued that its powers might be derived from previous practice of the respective Community institutions, to which the Court observed (para 36) that "a mere practice cannot override the provisions of the Treaty". Likewise, the court held in *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities* (Case 68/86) ECR 855, para 24, and reiterated in its *Opinion 1/94* [1994] ECR I-5267 in relation to suggested external competence in the field of GATs (the General Agreement on Trade in Services) that "a mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis" (para 52), that, it would, in the field of TRIPs (trade-related aspects of intellectual property rights), enable the Community institutions to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting (para 60) and that "Institutional practice in relation to

autonomous measures or external agreements adopted on the basis of article 113 cannot alter this conclusion" (para 61).

42. These statements, made in the context of arguments about institutional competence under the Treaties themselves, are a strong indicator of the attitude that the court would take to any suggestion that the member states could by agreement between themselves alter or influence the meaning of Community measures arrived at under the Treaties, following procedures for their negotiation and enactment, including consultation with the European Parliament, contained in such Treaties. The only case which the Ministries have been able to locate in which the court might be said to have taken account of member state practice in interpreting a Community instrument under any of the European Treaties is *Skatteministeriet v Henriksen* (Case 173/88) [1989] ECR 2763. There, after giving its reasons for a particular construction, the court added a paragraph saying:

> "That interpretation is also in conformity with the view common to all the member states, none of which has adopted legislation [consistent with the interpretation which the court rejected]" (para 13)

43. That comment, in a case where member states' "view" or practice was consistent with that at which the court had arrived, is wholly inapt to show that such practice is capable of changing the meaning of an autonomous European concept in a Community or Union instrument agreed under the Treaties.

44. I can therefore put aside the suggestion that member states' alleged practice can affect the question whether the Ministries are capable of being designated as "judicial authorities" for the purpose of issuing European arrest warrants under the Framework Decision. Equally, however, the interpretation of the Framework Decision cannot, as it seems to me, be influenced by comments made in some evaluation reports to the effect that Ministries of Justice are not judicial authorities: see eg Council Evaluation Report on Lithuania 12399/1/07, para 7.2.1.1, reporting that "The Lithuanian authorities recognised that EAWs should be issued by judicial authorities and that the Ministry of Justice could not be considered a judicial authority"; and the Commission report on the operation of the Framework Decision COM(207) 407, commenting in relation to both Lithuania and Estonia that the Ministry of Justice is not a judicial authority.

45. In my opinion, the concept of judicial authority falls simply to be interpreted in the teleological and contextual manner that Professor Anthony Arnull indicates in *The European Union and its Court of Justice*, 2nd ed (2006), pp. 612 and 621, as I stated in paragraph 229 of my judgment in *Assange* [2012] 2 AC

471. In the context of the Framework Decision, the most obvious purpose of insisting on the concept was to ensure objectivity (including freedom from political or executive influence) in decision-making and to enhance confidence in a system which was going to lead to a new level of mutual cooperation including the surrender of member states' own nationals to other member states. The special emphasis in recital 6 on the importance of this concept in the context of execution of European arrest warrants indicates a possible difference between its significance in the contexts of issuing and executing a European arrest warrant. Likewise, article 19 with its distinction between the competent executing judicial authority and "another judicial authority" which may need to be involved at the hearing stage "in order to ensure the proper application of this article and of the conditions laid down".

46. This leads to consideration of the features which an authority must as a minimum have, if it is to be regarded as an issuing judicial authority for the purposes of the Framework Decision. Mr Lewis, submits that they are three: (i) it must be functionally independent of the executive, (ii) it must be capable of making a judicial decision and (iii) it must be separate from the designated central authority, a separation assumed by recital 9 and article 7. In *Assange*, at para 153, Lord Dyson was "inclined to think that the essential characteristics of an issuing judicial authority are that it should be functionally (but not necessarily institutionally) independent of the executive". In the Administrative Court in the present cases, Aikens LJ considered that a ministry of justice could be an issuing judicial authority for a conviction warrant if the person in the ministry making the decision was "sufficiently independent of the executive for the purposes of making that 'judicial decision'" and thought, in this connection, that there was "much force in Lord Phillips' point [in *Assange* [2012] 2 AC 471, paras 62-64] about the requisite safeguards being predominantly in the antecedent process which forms the basis on which the conviction European arrest warrant is issued" (para 98).

47. I would make three points in relation to these observations. First, *Assange* was a case of an accusation warrant and Lord Dyson noted at paras 156-157 the difficulty about Lord Phillips' point, which constituted his second reason in *Assange* (see paras 62-64): there is no guarantee that a domestic accusation warrant would be based on any judicial decision at all, and the implications of a European arrest warrant are likely to be more serious than those of a domestic arrest warrant. Second, a test which would mean seeking to ascertain whether one or more individual decision-makers within a ministry was or were "functionally", even though not "institutionally", independent of the ministry in which they served, may be regarded as problematic, both in principle and because of the evidential issues to which it could give rise. On no view, in any event, would the Minister of Justice signing on behalf of the Ministry of Justice of Lithuania appear to satisfy any such test. I need say no more than that on these appeals. Third, Aikens LJ must I think have had this point in mind when he went on, immediately

after his above quoted observations, to focus his conclusions on the need for a prior court request that a European arrest warrant should be issued, and on the consequent restriction of any positive ministry role to determining that effect be given to such a request:

> "If the national law concerned provides that the pre-condition to the issue of a conviction EAW by the ministry of justice is that there must be not only an enforceable judgment and sentence but also a request from the sentencing court that a conviction EAW be issued, then the scope for executive interference is much reduced if not entirely eliminated." (para 98)

This postulates a situation in which the ministry's decision to issue a conviction European arrest warrant has by law to be and is firmly founded on a judicial decision by the responsible court that such a warrant is appropriate. Consistently with this approach, both Ministries of Justice sought in their submissions and evidence to meet the criteria suggested by Aikens LJ.

48. Accusation and conviction warrants do not necessarily raise the same considerations. A conviction warrant must necessarily have been preceded by a domestic court process. There is less scope for discretion in relation to the issue of a European arrest warrant following from a conviction. If the court responsible for the conviction or execution of the sentence considers that the European arrest warrant should be sought, and the issue of such a warrant follows from its decision, then the issue of the warrant can be regarded as the result of a judicial decision, even though the issue takes place by and in the name of a different authority. The key question is whether the issuing authority can in such a case be regarded as a judicial authority for the purposes of the Framework Decision or 2003 Act, when it is, as here, the Ministry of Justice or a section within that Ministry. Mr Lewis and Mr Jones submit that it cannot, on the basis that a body, which cannot act of its own initiative and which simply "box ticks", cannot be a judicial authority taking a judicial decision. They also point out that the two Ministries have also been designated as their respective countries' "central authorities" for the purposes of article 7, in circumstances where both recital 9 and article 7 contemplate that such a body will be separate from and have a limited role in proving practical and administrative assistance to the competent judicial authorities. Before going further into these questions, it is however relevant to look more closely at the evidence and facts in the cases under appeal.

The evidential material

49. The Administrative Court proceeded on the basis that the two requests made by the Ministry of Justice of Lithuania were based in each case upon a request "made by a court, not by a prison or the Prison Department"; the functions of the officials of the Ministry were "tightly defined by the Rules and the decision on whether to issue the conviction European arrest warrant has to be made on the basis of those Rules alone" (para 104). The warrants, though signed for the Ministry by the Minister of Justice, were on this basis regarded as issued by a judicial authority. In relation to the procedure in Estonia there was, however, much less material before the Administrative Court; there appeared to be "no requirement that the sentencing court must prepare a draft European arrest warrant and then request the ministry to issue the European arrest warrant" and "no procedural rules which dictate what the ministry officials have to do or which dictate the time in which a request to issue a conviction warrant be carried out". The court was not satisfied that the Ministry of Justice of Estonia's decision to issue a European arrest warrant could be regarded as "judicial" or that the International Judicial Cooperation Unit within that Ministry and its personnel had "sufficient functional independence from the executive to enable the Ministry to be characterised as a 'judicial authority'" for the relevant purposes (para 106).

50. Before the Supreme Court further material has been produced, in relation to both the Lithuanian and the Estonian positions. Mr Lewis referred to and relied upon the Lithuanian material as did eventually Mr Jones, after initially objecting to its admission. I for my part consider that the new material should be admitted and considered, even though it should have been before the Administrative Court. Without it, it is clear that we would be at risk of deciding these appeals on a false basis.

The Lithuanian position

51. The picture which emerges in relation to Lithuania from communications to the Crown Prosecution Service by the Vice Minister of Justice is that the Ministry only issues any European arrest warrant after conviction on the initiative of either (a) a court or (b) an authority responsible for executing the sentence. It does so then after examination of all the documents to ascertain that valid grounds exist for issuing such a warrant. In this connection, article 69 of the Code of Criminal Procedure provides:

> "2. European arrest warrants regarding citizens of the Republic of Lithuania or other persons who have been sentenced to imprisonment by enforceable judgments in the Republic of Lithuania

and who have absconded from serving the sentence in another member state of the European Union shall be issued and competent authorities of that state shall be contacted by the Ministry of Justice of the Republic of Lithuania.

3. The procedure for issuing a European arrest warrant and surrendering the person under the European arrest warrant shall be defined by the Prosecutor General of the Republic of Lithuania and by the Minister of Justice of the Republic of Lithuania."

52. Under article 69(3), the following "Rules for issuing European arrest warrant" were duly promulgated by Order No. IR-95/I-114 of 26 August 2004. They provide:

"**I. GENERAL PROVISIONS**

4. The Ministry of Justice of the Republic of Lithuania shall issue the European arrest warrant with a view to arrest a person who has been punished by custodial sentence but who has gone into hiding from the enforcement of this sentence. In this case the European arrest warrant shall be issued under the following circumstances:

4.1. when the remainder of the sentence to be served is of four months or of longer term;

4.2. when there is a ground to believe that the convicted person may be located in the member state of the European Union or other State, which applies the surrender procedure of the persons concerned pursuant to the European Arrest Warrant. ….

RECOURSE FOR ISSUING EUROPEAN ARREST WARRANT

7. If the case has been heard in the trial and the judgement of conviction rendered in absentia of the accused, the court shall send a copy of the enforceable judgement of conviction whereby a sentence of imprisonment has been imposed together with the draft European arrest warrant (except section (i)) to the Ministry of Justice of the Republic of Lithuania after taking into consideration the criteria for

issuing a European arrest warrant laid down in paragraph 12 of the Rules.

8. If the convicted person, who has not been arrested until the court judgement became enforceable, absconds from the execution of the custodial sentence imposed on him by the court's judgment, or if the convicted person while serving his custodial sentence runs away from the correctional institution or fails to return there, the request to issue the European arrest warrant shall be submitted to the Ministry of Justice by the institution executing the sentence after taking into consideration the criteria for issuing a European arrest warrant laid down in paragraph 12 of the Rules. A copy of the enforceable judgement of conviction whereby a sentence of imprisonment has been imposed and the draft European arrest warrant (except section (i)) shall be enclosed with the request. ….

9. When the court renders a Ruling to quash the suspension of the sentence execution, a Ruling to quash either a conditional early release from custodial sentence or conversion of the remainder of the sentence into a more lenient punishment or a Ruling to refer the person released conditionally from the correctional institution to serve the remaining sentence of imprisonment in the correctional institution, the court shall forward a copy of the aforesaid Ruling together with the draft European arrest warrant (except section (i)) to the Ministry of Justice of the Republic of Lithuania after taking into consideration the criteria for issuing a European arrest warrant laid down in paragraph 12 of the Rules.

III. ISSUING OF THE EUROPEAN ARREST WARRANT

12. Upon receiving the documents set out in Chapter II of these Rules, the Prosecutor General's Office of the Republic of Lithuanian or the Ministry of Justice of the Republic of Lithuania shall analyse the above documents and, if there are all preconditions listed in paragraphs 3 or 4 of the Rules, shall issue the European arrest warrant taking into consideration the severity and type of the offence committed and the suspected, accused or convicted person's personality. If the information is insufficient to issue the European arrest warrant, the Prosecutor General's Office of the Republic of Lithuania or the Ministry of Justice of the Republic of Lithuania shall contact the institution, which has requested to issue the European arrest warrant, asking to provide the missing information within the time-limit specified by the Prosecutor General's Office of

> the Republic of Lithuania or the Ministry of Justice of the Republic of Lithuania. If there are no grounds for issuing the European arrest warrant or the missing information is not obtained during the time-limit defined, or if the issuance of the European arrest warrant does not satisfy the principles of proportionality and procedural economy, the request to issue the European arrest warrant shall be returned to the requesting institution.
>
> 13. The European arrest warrant shall be issued not later than within 5 days after receiving all information necessary for preparing the European arrest warrant.
>
> 14. The European arrest warrant shall be prepared in accordance with the form contained in the Annex 1 of these Rules. ….
>
> 16. …. if the European arrest warrant is issued by the Ministry of Justice of the Republic of Lithuania, then it shall be undersigned by the Minister of Justice of the Republic of Lithuania or his delegated persons."

53. Contrary to the Administrative Court's understanding, it is now clear (from the Ministry of Justice's letter dated 5 November 2012) that, while the request made to the Ministry of Justice in respect of Bucnys, came under rule 9 from the Vilnius City 1st District Court after it had on 20 February 2010 quashed Bucnys's conditional release, the request in respect of Sakalis came from the Prison Department of the Republic under rule 8, based on its assessment that Sakalis had absconded from the whole of the four year sentence imposed by the Vilnius City 1st District Court on 25 January 2008 and upheld on appeal on 24 December 2008. The Vice-Minister of Justice of Lithuania has explained in correspondence put before the Supreme Court that the prison department would only act after being provided by the Vilnius City 1st District Court with relevant documentation regarding the conviction and sentence. It does not follow that the District Court made any sort of judicial decision at this point and the evidence does not show that it did. Both in law and in practice, the responsibility for requesting the Ministry of Justice to issue a European arrest warrant rested on the prison authorities, upon which rule 8 conferred it.

54. In these circumstances, I cannot regard the European arrest warrant issued in respect of Sakalis as having been either issued by a judicial authority or as being the result of a judicial decision. The Prison Department is an executive agency charged, as rule 8 states, with the execution of the sentence. It is not a judicial body considering and ruling upon the question whether the person wanted has

absconded. The language of rules 8 and 12, read together, makes it possible (though surprising) that the Prison Department is required before submitting a request to issue a European arrest warrant to the Ministry to take "into consideration the severity and type of the offence committed and the …. convicted person's personality". In other words, it may have a discretion. If so, the evident oddity in the context of a European arrest warrant of such a discretion being entrusted to a prison department merely underlines the fact that it cannot be regarded as a judicial authority. The Ministry of Justice after receiving the Prison Department request is under rule 12 required not only to consider for itself whether the formal pre-conditions listed in rule 4 are satisfied but (it appears) also to take "into consideration the severity and type of the offence and the …. convicted person's personality". Assuming again that this connotes an element of discretion, even in the case of a conviction, as to whether it issues a warrant, the mere fact that the Ministry of Justice is given a discretion does not make it a judicial body. If anything, it points once again towards a need for a judicial decision by a body or bodies which could be regarded as judicial. I would therefore allow the appeal by Sakalis and set aside the Part 1 warrant issued in respect of him.

55. The position in relation to Bucnys is different. Under the combination of rules 9 and 12, the Vilnius City 1st District Court not only took the decision to quash his conditional release on 12 September 2008, it also forwarded copies of its ruling to the Minister with a draft European arrest warrant, and it must be taken to have done this after taking into account the criteria for issuing such a warrant laid down in rule 12, including the "severity and type of the offence and the …. convicted person's personality". The Ministry of Justice's only role was to repeat the same exercise. Its review could not worsen the position of the convicted person. At best, if the Ministry took a different view on the question whether the criteria were met, its review might lead to a decision not to issue a European arrest warrant which the Vilnius court had adjudged to be appropriate. Essentially, therefore, the European arrest warrant issued in respect of Bucnys emanated from the court responsible for him having to serve a further period in prison. That was a judicial decision by a judicial authority. The Ministry by issuing the warrant effectively endorsed that decision.

56. Under article 7 of the Framework Decision, it would have been permissible for Lithuania to designate the Vilnius City 1st District Court as the relevant judicial authority and to restrict the Ministry's role to its capacity of central authority. If a court were to out-source its registry and the registry were to be designated as the judicial authority responsible for issuing warrants or other orders to give effect to the court's orders, it should I think be possible to regard the registry as a judicial authority issuing a judicial decision, even though - or because - it would simply be giving effect to the court's orders. In the present case, it appears that the Ministry of Justice had some discretion, but only in the sense of a one-way discretion to check that, in its view also, a European arrest warrant was appropriate. This

requirement for two concurrent decisions in favour of such a warrant could only operate to the benefit of the person whose surrender was proposed by the court responsible for the conviction or sentence. In these circumstances, I consider that European law would accept that the spirit of the Framework Decision was met in the case of European arrest conviction warrants issued by the Ministry of Justice of Lithuania to give effect to a corresponding request by the Court responsible for the sentence, and would treat the Ministry of Justice in that context as an appropriate issuing judicial authority.

57. I have been addressing the present situation of a Ministry of Justice acting at the request of the responsible court. It is possible that the spirit of the Framework Decision may also be satisfied in some other situations, for example when a Ministry of Justice acts on the basis of a request made by a public prosecutor, held by this court in *Assange* to be capable of being regarded as a judicial authority. To take a specific instance, in Germany the Ministry of Justice is designated as the relevant judicial authority for the purpose of issuing conviction (and indeed also accusation) European arrest warrants, but has in some way transferred or delegated its role to the public prosecutor at the relevant regional court. As we have no details of the arrangements or how they operate, I can express no conclusion either way, but it may prove appropriate to treat the Federal Ministry of Justice as the issuing judicial authority, when a German public prosecutor's decision that a conviction European arrest warrant should be issued is simply endorsed by or leads to the issue of such a warrant in the name of the Ministry.

The Estonian position

58. Turning to the position of the European arrest warrant issued by the Head of the International Cooperation Unit of the Estonian Ministry of Justice, it is now known that the Viru County Court on 10 February 2011, on learning that Lavrov was living in the United Kingdom, sent a request to the Ministry of Justice to issue a warrant to give effect to the domestic arrest warrant that it had itself issued on 9 February 2010. There is also substantial further information about the Estonian legal position in the form of answers dated 28 February 2013 to a questionnaire submitted by the Crown Prosecution Service.

59. The legal framework is contained in article 507 of the Code of Criminal Procedure of Estonia which reads:

> "Submission of European arrest warrant

(1) In pre-trial proceedings, the Prosecutor's Office and, in court proceedings, the court which conducts proceedings regarding a criminal offence which is the basis for a European arrest warrant is competent to submit the European arrest warrant.

(2) The Ministry of Justice is competent to submit a European arrest warrant for the execution of a court judgment which has entered into force.

(2^1) In pre-trial proceedings, a preliminary investigation judge may, at the request of the Prosecutor's Office, apply arrest for surrender before preparation of a European arrest warrant.

(2^2) If surrender of a person is requested in court proceedings, the arrest for surrender of the person shall be applied by the court which conducts proceedings regarding the criminal offence.

(3) A European arrest warrant shall be prepared in Estonian and it shall be translated into the language determined by the requesting state by the Ministry of Justice.

(4) A European arrest warrant shall be communicated to a requesting state through the Ministry of Justice.

(5) In cases of urgency, a request for application of arrest for surrender with regard to a person to be surrendered may be submitted to a member state of the European Union through the International Criminal Police Organisation (Interpol) or the central authority responsible for the national section of the Schengen Information System with the consent of the Prosecutor's Office before a European arrest warrant is submitted."

60. In the case of Lavrov, articles 507(2) and 507(2^2) both applied. The Deputy Secretary-General of the Ministry of Justice explained by letter dated 28 February 2013:

"The court ruling declaring the person a wanted and applying arrest-on-sight towards him or her is the prerequisite for later issuance of a European arrest warrant. No European arrest warrant can be issued

without a court first declaring the person a wanted and applying arrest-on-sight (domestic arrest warrant) towards him or her.

Pursuant to section 507 (2^1) and (2^2) of the Estonian Code of Criminal Procedure, applying arrest for surrender is a prerequisite for issuing an European arrest warrant. If no arrest pending surrender has been applied towards the person, then an European arrest warrant cannot be issued."

61. This letter gives the following further information:

"… in this current case a court requested the Ministry of Justice to issue a European arrest warrant on the basis of court decisions entered into force. The issuance of an European arrest warrant in conviction cases by the Estonian Ministry of Justice only takes place upon request by the court who made the decision in the specific case or a court that has the competence to issue the arrest warrant and to declare the person a fugitive in cases where the person was convicted by conditional sentence and the person escaped from the execution of sentence or the person was in freedom during the court procedures but has to appear to prison on a specific date and time to start the service of his/her sentence. Thus, this is the court that sends to the Ministry of Justice the judgment or ruling with request to issue the European arrest warrant. The court's decision has to be either a final and enforceable judgment satisfying the requirements of the framework decision or a domestic arrest warrant stating that the detention conditions are met.

….

The only restrictions that the Ministry of Justice is obliged to follow upon issuing a European arrest warrant on a court's request, are the general restrictions on issuing of European arrest warrants from [the] Framework Decision ie the requirement that the punishment of imprisonment applicable to a crime for which the person has been convicted must be longer than four months of imprisonment. If the materials sent to the Ministry of Justice for issuance of an European arrest warrant regarding a person towards whom the court has applied arrest for surrender, indicate that the actual punishment imposed on the person or actually servable part thereof is less than four months, then the Ministry of Justice may inform the court that there are no legal grounds for issuing an EAW. In other cases the

court's request to issue a specific EAW is compulsory for the Ministry of Justice."

62. The same letter also addresses the possibility that a European arrest warrant might be issued under executive influence:

> "The Judicial Co-operation Unit is one of the structural units of the Ministry of Justice, but it is independent in its decisions and bases its actions solely on the law and the international instruments. This independence is also expressed in the fact that all documents prepared by the unit, ie both European arrest warrants and MLA [mutual legal assistance] requests for judicial assistance are undersigned by the head of unit or the advisor who prepared the letter. All materials, ie requests from courts, materials of the prosecutor's office, and also judicial co-operation materials and requests for legal assistance received from abroad are forwarded from the Ministry's office directly to the Judicial Co-operation Unit without passing through the Minister, the Secretary General or the Deputy Secretary General. Therefore the executive has no information about whether, how much or which judicial co-operation materials are being preceded by the unit at any time. There has been no intervention by the executive in the unit's work and there cannot be any intervention of that kind because communication in the field of international law is very strictly regulated by domestic legislation and by various other legal acts, so it is unthinkable that the Minister or the Secretary General could order the issuance of some request for legal assistance without the initiative of a prosecutor's office or a court.
>
> ….
>
> International judicial co-operation is very strictly and precisely regulated by various international conventions and treaties which prescribe also the role and competence of Ministries of Justice as central authorities. It is unthinkable that the Ministry of Justice could exceed its limits of competence by way of its executive ordering a request for legal assistance for which the Ministry of Justice has competence. It is also unthinkable that the executive of the Ministry of Justice could order that a request for legal assistance be not issued or not forwarded. As described above, in daily work the management has no information at all about the requests that are preceded [sic] by the Unit at any given time. Furthermore, the Public Service Act of

> the Republic of Estonia prohibits (article 62) unlawful orders from the executive and gives the ways how to react in such situations."

63. On the basis of this detailed description of the legal, procedural and practical position, it is clear that the real decision is taken by the court responsible for the conviction and sentence, and the Judicial Cooperation Unit of the Ministry of Justice's only lawful role is to check that the formal conditions for issue of a European arrest warrant are satisfied, and, if they are, to issue the warrant. On the basis, by parallel reasoning to that which I have indicated in relation to Bucnys, I consider that the Ministry can be regarded as a judicial authority issuing a warrant containing a judicial decision, albeit one taken in reality by the responsible court, here the Viru County Court.

64. However, Mr Jones points to other information in the form of the Council Evaluation Report on Estonia 5301/07 dated 20 February 2007, which states:

> "3.1. THE DECISION TO ISSUE
>
> The Estonian authorities do not have a formal practice guide concerning the instigation of European arrest warrant proceedings or the subsequent steps to be taken. Standardised European arrest warrant practices have been outlined to all European arrest warrant stakeholders during training provision supplied by the CA together with professional trainers from the Estonian Law Centre."

It states that, in the case of accusation warrants, the following factors will be taken into consideration by a review made before any decision to issue a European arrest warrant: severity of the offence, degree of participation, extent of the injury/damage. It continues:

> "In cases concerning the enforcement of a sentence, officials within the CA will apply similar merit tests to assess the appropriateness of the application. They will then obtain, directly from the criminal court concerned, a copy of the order to be enforced and proceed to draft an European arrest warrant.
>
> In real terms therefore a pragmatic de minimis test is brought to bear, balancing the seriousness of the criminality against the merits (costs or otherwise) of issuing an European arrest warrant. Estonia reported that their outgoing European arrest warrants were all of a benchmarked standard. "

65. This second-hand account of the Estonian system does not bear much relationship with that given by the Ministry of Justice itself in 2012 and 2013. It makes no reference to the provisions of article 507 of the Code of Criminal Procedure, or to any role of the court responsible for the conviction, still less to any duty on the part of the Ministry to issue a European arrest warrant, once satisfied that the formal conditions are met. Although the report points out earlier that the Ministry of Justice has been designated both as the competent judicial authority and as the central authority in relation to the issue of European arrest conviction warrants, it speaks at this point only of the "CA". The report was based on a visit by experts to Estonia in September 2006, little over two years after Estonia joined the European Union on 1 May 2004. The European arrest warrant system may not have been well digested by that date. The Code of Criminal Procedure may have been amended since 2006 – it seems clear that article 507(2^1) and (2^2) must have been added at some point. However, even if, contrary to the Ministry's emphatic explanation, the Judicial Cooperation Unit of the Ministry does enjoy some form of "proportionality" discretion, when it comes to the exercise of a European arrest warrant requested by a court responsible for a sentence, this is again a factor which can only weigh in favour of the person whose surrender is sought. It does not therefore mean, in my opinion, that the Ministry in issuing the European arrest warrant in respect of Lavrov should not be regarded as a judicial authority communicating a judicial decision made by the Viru County Court.

Conclusions

66. The conclusions of principle that I reach are: -

For the purposes of Council Framework Decision 2002/584/JHA and Part 1 of the Extradition Act 2003:

> i) A European arrest warrant issued by a Ministry in respect of a convicted person with a view to his or her arrest and extradition can be regarded as issued by a judicial authority for the purposes of Council Framework Decision 2002/584/JHA and Part 1 of the Extradition Act 2003 if the Ministry only issues the warrant at the request of, and by way of endorsement of a decision that the issue of such a warrant is appropriate made by:
>
> a) the court responsible for the sentence; or

b) some other person or body properly regarded as a judicial authority responsible for its execution (see para 57 above).

ii) If this condition is satisfied, the existence of a discretion on the part of the Ministry *not* to issue a European arrest warrant which the responsible court (or other judicial authority) has decided appropriate and requested it to issue does not affect this.

iii) Subject only to the second point in para 47 above (so far as left open), a Ministry which has power to issue and issues a European arrest warrant of its own motion or at the request of non-judicial authority, including an executive agency such as a prison department, cannot be regarded as a judicial authority for the above purposes.

67. The conclusions I reach on these appeals are that:

i) The European arrest warrant issued in respect of Bucnys by the Ministry of Justice of Lithuania at the request of the Vilnius City 1st District Court was a valid Part I warrant under the 2003 Act, and Bucnys's appeal should accordingly be dismissed.

ii) The European arrest warrant issued in respect of Sakalis by the same Ministry of Justice at the request of the Prison Department was not a valid Part 1 warrant, and Sakalis's appeal should accordingly be allowed.

iii) The European arrest warrant issued in respect of Lavrov by the Ministry of Justice of Estonia at the request of the Viru County Court was a valid Part I warrant, and the Ministry of Justice of Estonia's appeal in the case of Lavrov should accordingly be allowed.